IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: RONALD A. HEFTY, Debtor **No. 5:13-bk-71974**
Ch. 13

ORDER

Before the Court is the debtor's *Motion to Determine Applicability of Automatic Stay* that was filed on June 17, 2013, and heard by the Court on July 9. Christopher Harris appeared for the debtor, and the debtor was present and testified. At the conclusion of the hearing, the Court took the matter under advisement. Based on the evidence presented, the Court respectfully denies the debtor's request that the Court find that the automatic stay applies to the order of contempt entered in Benton County Circuit Court Case No. DR 2012-0841-6.

The evidence before the Court is scant. In addition to the debtor's testimony, the debtor requested the Court to take judicial notice of Jamee McMahon's *Amended Counterpetition For Citation For Contempt* that was filed in the state court on May 1, 2013, and the state court's *Amended Order of Contempt* that was filed on June 7, 2013. The amended order for contempt changed the period of time the debtor was required to be incarcerated from every weekend to every other weekend. Even though the amended order was filed on June 7, the first line of the amended order states: "NOW ON THIS 23rd day of May, 2013, the Defendant is found to be in willful contempt of Court orders." The debtor filed his bankruptcy petition on June 4, twelve days after the state court entered its initial order of contempt.

The debtor testified during the hearing that he was current on child support when he was served with the petition for contempt. This statement appears to contradict the alleged facts contained within Ms. McMahon's amended counterpetition. Regardless, the

petition for contempt contains nothing more than allegations by Ms. McMahon. The only factual document presented to the Court was the amended order of contempt. In this instance, that order is sufficient because, under Arkansas law, "where the failure or refusal to abide by an order of the court is the issue, we do not look behind the order to determine whether the order is valid." *McCullough v. State*, 5 S.W.3d 38, 41 (Ark. 1999). Further, this Court is without subject-matter jurisdiction under the Rooker-Feldman Doctrine to review the state court order. *See Riehm v. Engelking*, 538 F.3d 952 (8th Cir. 2008). As stated earlier, the first sentence of the state court's order of contempt states that the debtor "is found to be in willful contempt of Court orders." However, the order does not indicate whether the contempt is civil contempt or criminal contempt.

According to the Eighth Circuit, "[t]here is considerable confusion in the courts over the distinction between civil and criminal contempt." *Hubbard v. Fleet Mortg. Co.*, 810 F.2d 778, 781 (8th Cir. 1987). If the order of contempt is for civil contempt--for instance, an order that relates to civil remedies in the form of a private right of action such as the collection of fees--the order may be subject to the automatic stay. *See, e.g., In re Storozhenko*, 459 B.R. 697, 705 (Bankr. E.D. Mich. 2011) (stating if the initiated proceeding is a civil contempt proceeding, movant would not be subject to the automatic stay without the protection of "criminal action or proceeding" exception). If, however, the contempt is "punitive and intended to vindicate the authority of the court, then the contempt is criminal." *Hubbard*, 810 F.2d at 781-82 (citing *United States v. United Mine Workers*, 330 U.S. 258, 302-04 (1947)). A finding of criminal contempt is tantamount to a criminal action or proceeding against the debtor and is not subject to the automatic stay under § 362(b)(1). *See, e.g., In re Campbell*, 185 B.R. 628, 631 (Bankr. S.D. Fla. 1995) (stating in dicta in a domestic relations case that movant may seek finding of criminal contempt that would not be subject to automatic stay); *In re Schake*, 154 B.R. 270, 274 (Bankr. D. Neb. 1993) (expressing disagreement with narrow construction of § 362(b)(1) that would only permit the exception for formal criminal litigation); *Titan Enter. Int'l, Ltd. v. Anoai* (*In re Anoai*), 61 B.R. 918, 921 (Bankr. D. Conn. 1986) (holding in a civil action that a proceeding for the purpose of determining whether criminal contempt was committed and punishing any such conduct is a criminal proceeding under § 362(b)(1)).

The Supreme Court of Arkansas also recognized the distinction between civil and criminal contempt: "Because civil contempt is designed to coerce compliance with the court's order, the contemnor may free himself or herself by complying with the order. This is the source of the familiar saying that civil contemnors 'carry the keys of their prison in their own pockets.' Criminal contempt, by contrast, carries an unconditional penalty, and the contempt cannot be purged." *Conlee v. Conlee*, 257 S.W.3d 543, 550 (Ark. 2007); *see also Stilley v. Fort Smith Sch. Dist.*, 238 S.W.3d 902, 910 (Ark. 2006).

The state court order of contempt in this case states specifically that the debtor is in willful contempt of state court orders and sentences the debtor to serve time in jail. The order does not indicate that the debtor can avoid incarceration by taking some additional action or that the purpose of the order is to coerce compliance with a previous order. On its face, the state court order of contempt is for criminal contempt; it carries an unconditional penalty and cannot be purged. As such, the automatic stay under § 362(a) does not apply and the Court denies the debtor's request to enter an order nullifying the state court contempt order.

IT IS SO ORDERED.

Ben Barry
United States Bankruptcy Judge
Dated: 07/12/2013

cc: J. Christopher Harris
Joyce B. Babin